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IN THE

Supreme Court of the United States

October Term, 1965

No. 147

BALDWIN-HALL, INC.,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

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APPENDIX

DECISION OF APPELLATE DIVISION.

MEMORANDUM:

Judgment insofar as it awards damages to claimant unanimously reversed on the law and facts and claim dismissed and otherwise judgment affirmed, without costs of these appeals to either party. Certain findings of fact and conclusions of law disapproved and reversed and new conclusions made. Memorandum: The State appeals from that portion of the judgment which makes an award to claimant in the sum of $57,000 plus interest as damages for diminution in value of claimant's property caused by the change of grade of Oswego Boulevard in front of claimant's premises for the purpose of construction of an arterial highway. No part of claimant's property was appropriated. The damages claimed by claimant were the result of loss of direct access to the new highway, diversion of traffic making vehicular access to the premises more circuitous from two directions, loss of view by boulevard users and impairment of light and air, none of which give rise to compensable damages under the change of grade statute. (See Second Class Cities Law, § 99.) In *Selig* v. *State of New York*, (10 N. Y. 2d 34) the court said at page 39: "It has long been the rule in this State that consequential damages may not be recovered by an abutting property owner for the diminution in value of his property because the State, in changing the course of a adjoining highway, interferes with the access to his land or diverts traffic therefrom. Damages resulting merely from circuity of access are considered as *damnum absque injuria*". (See, also, *Nettleton Co.* v. *State of New York*, 11 A. D. 2d 899; *Hall & McChesney* v. *State of New York*, 15 Misc. 2d 748, affd. 11 A. D. 2d 899, mot. for lv. to app. den. 8 N. Y. 2d 710; *National Biscuit Co.* v. *State of New York*, 12 A. D. 2d 998, mod. 14 A. D. 2d 729, affd. 11 N. Y. 2d 743, cert. den. 370 U. S. 924.) We conclude that the

diminution in value of claimant's property is considered as *damnum absque injuria*. Accordingly, the judgment awarding damages should be reversed and the claim dismissed; in all other respects the judgment should be affirmed.

FIRST, UNREVISED DECISION OF COURT OF APPEALS.

MEMORANDUM:

The order should be affirmed, without costs, on the memorandum at the Appellate Division. We make this further comment: the market value of claimant's property was in fact diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard on which street claimant's property fronted before the changes were made. However, as explained in *Selig* v. *State of New York*, (10 N. Y. 2d 34), such damages although in a sense resulting from a change of grade are not compensable when there has been no taking of any part of the subject property, no direct physical damage thereto from the change of grade, and no change in grade of any street or part thereof actually abutting on the property. Such damage as claimant suffered was due to an impairment of access and as held in *Selig* there is no provision in law for the recovery thereof.

BERGAN, J. (dissenting)

Resolution of the legal problem in this case seems possible on the line of a simple form of syllogism: The statute requires compensation for damage done by a change of grade of a street; the unreversed finding of the Court of Claims is that the street grade was changed; there is some uncontradicted proof of damage to claimant attributed solely to the change in street grade.

First, Unrevised Decision of Court of Appeals.

It is conceded by the State that the statute (Second Class Cities Law, § 99) applicable to this Syracuse street requires "compensation for damages done" in changing the "grade of a street" and this section must be read with Highway Law, § 30 (15). (*Mirro* v. *State of New York*, 260 App. Div. 525, affd. 285 N. Y. 678.)

A number of factual findings that there had been a change in street grade were made by the Court of Claims. These findings were not reversed, or even referred to, by the Appellate Division's order which was expressly addressed to the finding of damages sustained by claimant from the change of grade. The Appellate Division's memorandum indicated the court believed no such damage had been established.

But there is opinion evidence in the record that, eliminating all other elements which the Appellate Division held inapplicable, and on the basis of a change of grade alone, claimants had been damaged. This evidence, which is not factually disputed could not be entirely disregarded by the Appellate Division as though it were not in the record.

The decision in *Selig* v. *State of New York*, (10 N. Y. 2d 34) did not hold, and could not in view of the statute have held, that if there were a change of grade and resulting damage, there could not be a recovery. It held, rather, there were no damages established by virtue of a change in grade. That is not this case and the statute mandates "compensation for damages done" by a change in grade. The order should be reversed and the judgment of the Court of Claims reinstated.

VAN VOORHIS, J. (dissenting):

I concur in Judge Bergan's dissenting opinion and agree that the order appealed from should be reversed and the

judgment of the Court of Claims reinstated. All vehicular accession to one street upon which claimant's building fronted is eliminated by change of grade. In *Buro* v. *State*, 306 N. Y., 730, affirming 281 App. Div. 61, and *Selig* v. *State*, 10 N. Y. 2d 34, recovery was denied for the reason that accession to the affected street was not destroyed, but was rendered less valuable due to the raising or depression of the center of the street, or the routing of traffic. In cases as *Red Apple Rest.* v. *McMorran*, 12 N. Y. 2d 203, accession into large parking areas abutting the street was channeled by guard rails, in the interest of public safety, and damages were disallowed for the reason that "The guard rails, as erected, did not create a nonaccess highway or bar access to the premises in question but left ample room for ingress and egress." Access to one street is being entirely prevented, by this change of grade, to one street on which the property runs, without compensation, for the reason that the property can still be reached by another street at the rear. This, in my judgment, goes beyond anything that has been held in any previous case.

* * * * *

Order affirmed, without costs, in a memorandum. No opinion. All concur except Van Voorhis and Bergan, JJ., who dissent in separate opinions in each of which the other concurs and in both of which Scileppi J. concurs.

FINAL, REVISED DECISION OF COURT OF APPEALS.

The order should be affirmed, without costs, on the memorandum at the Appellate Division. We make this further comment: the market value of claimant's property was probably diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard on which street claimant's property fronted before any of the changes were made. However, as explained in *Selig* v. *State of New York*, (10 N. Y. 2d 34), such damages although in a sense resulting from a change of grade are not compensable when there has been no taking of any part of the subject property and no direct physical damage thereto from any change of grade of any street. In this instance the street on which the building formerly fronted was moved to a new location some distance away, and depressed, but the building still abutted at one side on another usable street. Such damage as claimant suffered was due to circuity of access and as held in *Selig* there is no provision in law for recovery thereof.

BERGAN, J. (dissenting). Resolution of the legal problem in this case seems possible on the line of a simple form of syllogism: the statute requires compensation for damage done by a change of grade of a street; the unreversed finding of the Court of Claims is that the street grade was changed; there is some uncontradicted proof of damage to claimant attributed solely to the change in street grade.

It is conceded by the State that the statute (Second Class Cities Law, § 99) applicable to this Syracuse street requires "compensation for damages done" in changing the "grade of a street" and this section must be read with subdivision 15 of section 30 of the Highway Law. (*Mirro* v. *State of New York*, 260 App. Div. 525, affd. 285 N. Y. 678.)

A number of factual findings that there had been a change in street grade were made by the Court of Claims. These findings were not reversed, or even referred to, by the Appellate Divion's order which was expressly addressed to the finding of damages sustained by claimant from the change of grade. The Appellate Division's memorandum indicated the court believed no such damage had been established.

But there is opinion evidence in the record that, eliminating all other elements which the Appellate Division held inapplicable, and on the basis of a change of grade alone, claimants had been damaged. This evidence, which is not factually disputed, could not be entirely disregarded by the Appellate Division as though it were not in the record.

The decision in *Selig* v. *State of New York,* (10 N. Y. 2d 34) did not hold, and could not in view of the statute have held, that, if there were a change of grade and resulting damage, there could not be a recovery. It held, rather, there were no damages established by virtue of a change in grade. That is not this case and the statute mandates "compensation for damages done" by a change in grade. The order should be reversed and the judgment of the Court of Claims reinstated.

VAN VOORHIS, J. (dissenting). I concur in Judge BERGAN's dissenting opinion and agree that the order appealed from should be reversed and the judgment of the Court of Claims reinstated. All vehicular accession to one street upon which claimant's building fronted is eliminated by change of grade. In *Buro* v. *State of New York,* (306 N. Y. 730, affg. 281 App. Div. 61) and *Selig* v. *State of New York,* (10 N. Y. 2d 34) recovery was denied for the reason that accession to the affected street was not destroyed, but was rendered less valuable due to the raising or depression of the center of the street, or the routing of traffic. In cases such as *Red Apple Rest* v.

McMorran, (12 N. Y. 2d 203), accession into large parking areas abutting the street was channeled by guardrails, in the interest of public safety, and damages were disallowed for the reason that "The guardrails, as erected, did not create a nonaccess highway or bar access to the premises in question but left ample room for ingress and egress." Access to one street is being entirely prevented, by this change of grade, to one street on which the property runs, without compensation, for the reason that the property can still be reached by another street at the rear. This, in my judgment, goes beyond anything that has been held in any previous case.

Chief Judge DESMOND and Judges DYE, FULD and BURKE concur in MEMORANDUM; Judges VAN VOORHIS and BERGAN dissent in separate opinions in each of which the other concurs and in both of which Judge SCILEPPI concurs.

Order affirmed, without costs, in a memorandum.

JUDGMENT ON DECISION OF NEW YORK STATE COURT OF APPEALS.

The above-named claimant-appellant having appealed to the Court of Appeals from an Order of the Appellate Division of the Supreme Court, Fourth Judicial Department, entered in the Clerk's Office of the Court of Claims on October 29, 1964, reversing the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, and dismissing claim; and judgment in accordance with the said order of the Appellate Division having been entered in the Clerk's Office of the Court of Claims on October 30, 1964, reversing judgment insofar as it awards damages of claim, and dismissing claim, without costs to either party; and said appeal having been argued by Vincent A. O'Neil, of Counsel

Judgment on Decision of New York State Court of Appeals.

for the Appellant, and by Honorable Louis J. Lefkowitz, Attorney General, by Jean M. Coon, of counsel, for the respondent, The State of New York, and after due deliberation the Court of Appeals having handed down its decision on November 24, 1965, affirming the order appealed from, without costs, all concurring except Van Voorhis and Bergan, J. J., who dissent in separate opinions in each of which the other concurs and in both of which Scileppi, J., concurs, and an Order having been entered in the Court of Appeals on November 24, 1965, in accordance with the said decision;

AND the original record on appeal together with a certified copy of the Order of the Court of Appeals entered in the Clerk's Office thereof on November 24, 1965, having been filed in the Clerk's Office of the Court of Claims on December 6, 1965, it is

ORDERED AND ADJUDGED, That the Order of the Appellate Division of the Supreme Court, Fourth Judicial Department, entered in the Clerk's Office of the Court of Claims on the 29th day of October 1964, reversing the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, and dismissing the claim, without costs to either party, be and the same is affirmed, without costs.

Dated: Albany, New York
December 22, 1965

ROBERT T. CROSS
Deputy Clerk of the Court of Claims

ORDER DENYING REARGUMENT.

STATE OF NEW YORK — IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the Seventeenth day of February, A. D. 1966.

Present: HON. CHARLES S. DESMOND,
Chief Judge, presiding.

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4 Mo. No. 208

Baldwin-Hall Co., Inc.,
Appellant,

— *vs.* —

The State of New York,
Respondent.

A motion for reargument of the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

(SEAL)

A copy
RAYMOND J. CANNON
Clerk

ORDER GRANTING AMENDMENT OF REMITTITUR.

STATE OF NEW YORK — IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-fourth day of March, A. D. 1966.

Present: HON. CHARLES S. DESMOND,
Chief Judge, presiding

Mo. No. 269
Baldwin-Hall, Co., Inc.,
Appellant,
— *vs.* —
The State of New York,
Respondent.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellant under the Fifth and Fourteenth Amendments were violated. Appellant contends that by changing the grade of street level abutting its business property the State effected a taking of its property and that the failure to compensate it therefor constituted a denial of due process under the Fifth and Fourteenth Amendments. The Court of Appeals considered this contention and held that there was no denial of the appellant's constitutional rights.

AND the Court of Claims hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(SEAL)

A copy
GEARON KIMBALL
Deputy Clerk

JUDGMENT AMENDING REMITTITUR.

The above-named claimant-appellant having appealed to the Court of Appeals from an Order of the Appellate Division of the Supreme Court, Fourth Judicial Department, entered in the Clerk's Office of the Court of Claims on October 29, 1964, reversing the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, and dismissing claim; and judgment in accordance with the said order of the Appellate Division having been entered in the Clerk's Office of the Court of Claims on October 30, 1964, reversing judgment insofar as it awards damages of claim, and dismissing claim, without costs to either party; and said appeal having been argued by Vincent A. O'Neil, of counsel for the appellant, and by Honorable Louis J. Lefkowitz, Attorney General, by Jean M. Coon, of counsel, for the respondent, The State of New York, and after due deliberation the Court of Appeals having handed down its decision on November 24, 1965, affirming the order appealed from, without costs, all concurring except Van Voorhis and Bergan, JJ., who dissent in separate opinions in each of which the other concurs and in both of which Scileppi, J., concurs, and an Order having been entered in the Court of Appeals on November 24, 1965, in accordance with the said decision;

AND the original record on appeal together with a certified copy of the Order of the Court of Appeals entered in the Clerk's Office thereof on November 24, 1965, having been filed in the Clerk's Office of the Court of Claims on December 6, 1965, and Judgment in accordance therewith having been entered in the Clerk's Office of the Court of Claims on December 22, 1965;

AND a motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon to the Court of Appeals and due deliberation having been there-

upon had, and an Order having been entered in the Clerk's Office of the Court of Appeals on March 24, 1966, granting the said motion, requesting the return of the remittitur and amending same by adding thereto in accordance with the decision of the Court of Appeals handed down on March 24, 1966, it is

ORDERED AND ADJUDGED that the remittitur of the Court of Appeals be and the same hereby is amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellant under the Fifth and Fourteenth Amendments were violated. Appellant contends that by changing the grade of street level abutting its business property the State effected a taking of its property and that the failure to compensate it therefor constituted a denial of due process under the Fifth and Fourteenth Amendments. The Court of Appeals considered this contention and held that there was no denial of the appellant's constitutional rights."

and it is further

ORDERED AND ADJUDGED, That the Order of the Appellate Division of the Supreme Court, Fourth Judicial Department, entered in the Clerk's Office of the Court of Claims on the 29th day of October, 1964, reversing the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, and dismissing the claim, without costs to either party, be and the same hereby is affirmed, without costs.

Dated: Albany, New York
April 4, 1966

ROBERT T. CROSS
Deputy Clerk of the Court of Claims

SECTION 99, SECOND CLASS CITIES LAW OF STATE OF NEW YORK.

"The grade of any street shall not be fixed or established except by direction of the common council. The grade of a street heretofore or hereafter legally established shall not be changed, except by direction of the common council, and except also upon compensation for damages done, to be ascertained in and by the proceedings provided by law for ascertaining damages for lands taken for the opening of streets. * * * ."

SECTION 30 (15), HIGHWAY LAW OF STATE OF NEW YORK.

"If the work of constructing, reconstructing or improving such state highways and bridges causes damage to property not acquired as above provided, the state shall be liable therefor, but this provision shall not be deemed to create any liability not already existing by statute. * * * "

AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES (Excerpt).

"No person shall be * * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES, SECTION 1 (Excerpt).

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE 1, SECTION 6 OF THE CONSTITUTION OF THE STATE OF NEW YORK (Excerpt).

"No person shall be deprived of life, liberty or property without due process of law."

ARTICLE 1, SECTION 7 OF THE CONSTITUTION OF THE STATE OF NEW YORK (Excerpt).

"(a) Private property shall not be taken for public use without just compensation."

EXCERPTS FROM RECORD ON APPEAL.

(P. 7)

DECISION.

* * * * *

(P. 9)

9. At the time of the reconstruction of Oswego Boulevard, claimant's property had a frontage of 103.38 feet on Oswego Boulevard, 83.93 feet on West Belden Avenue, and measured 46.67 feet long along the north boundary and 108.35 feet along its west boundary.

10. The land was improved by a five story brick building built over 65 years ago, and is still in good condition as shown on photographs thereof received in evidence.

* * * * *

(P. 10)

12. Prior to the reconstruction of Oswego Boulevard and surrounding area, the claimant's property was at grade with Oswego Boulevard.

13. After the reconstruction, the grade of the street in front of the claimant's property was changed and lowered.

14. The branch of Oswego Boulevard which formerly existed in front of the claimant's property is now called "Ramp C" and is 14 feet wide at its narrowest point.

15. As a result of the change of grade of Oswego Boulevard in front of the claimant's property and the construction of "Ramp C", the State constructed a concrete wall along the westerly side of "Ramp C" about four (4) feet high at the north end and increasing to about 8½ feet above the pavement of the reconstructed North Salina Street at the south end or line of claimant's premises.

16. A four-rung metal fence about four (4) feet in height was constructed on the top of the wall by the State.

Decision.

17. The highest and best use of claimant's property prior to the reconstruction was for general retail and wholesale purposes; after the reconstruction for warehousing with very limited retailing on the first floor.

* * * * *

(P. 11)

19. The fair and reasonable market value of the claimant's property prior to the commencement of the reconstruction and lowering of the grade in front thereof was $122,000.00.

20. The fair and reasonable market value of claimant's property after the reconstruction and lowering of the grade in front thereof was $65,000.00.

21. As a direct result of the change of grade in front of claimant's premises, the claimant was damaged in the sum of $57,000.00, and is entitled to an award in that amount with interest thereon from March 18, 1957.

22. The Court viewed the premises.

* * * * *

(P. 12)

CLAIMANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

* * * * *

5. The property which is the subject of this claim was acquired by claimant on April 30, 1946 for the sum of $45,000.00 (Exhibit 3; Vol. I, 121). Found P. C. R.

* * * * *

(P. 13)

11. After claimant purchased the property in 1946, claimant undertook extensive remodeling, renovations and alterations with respect to the building (Vol. I, 122-125). Found. P. C. R.

12. The remodeling, renovations and alterations done by claimant in the years 1946 and 1947 consisted of the

(P. 14)

following: the five separate entrances to the building on Oswego Boulevard were removed and the front entrance was remodeled so as to be suitable for retail purposes; the basement and first floors of the building were supported with beams and reinforced with concrete and steel sections of new floorings; previously the building had no central heating; a boiler room was installed in the basement to accommodate a steam heating system with a Cyclotherm oil burning boiler; vectors, unit heaters, piping and electrical controls were installed throughout; the building had inadequate toilet facilities and new plumbing and toilet fixtures were installed throughout; claimant installed all new electrical wiring and electrical fixtures in the building including 50 fluorescent fixtures in the office, 10 to 15 fluorescent fixtures to display retail wares and fluorescent fixtures throughout the shipping area; the main floor was

completely remodeled and divided into three sections — retail store, sales offices with plaster walls and shipping area; an acoustical ceiling and tile floor was installed; the second floor was completely remodeled by setting up three private offices, a conference room and one large general office, all with acoustical ceilings and tile floors and this second floor became claimant's general offices; the third, fourth and fifth floors were rewired and renovated; the stairway between the first and second floor was remodeled; a new roof with flashings was installed; downspouts were repaired; sewer and water connections were renovated; windows were repaired; the existing loading dock on West Belden Avenue was extended ten feet and a pit leading to the basement with a conveyor belt was con-
(P. 15)
structed (Vol. I, 122-125, 178, 179, 188, 189; Vol. II, 80-84, 138, 153-156). Found. P. C. R.

13. The cost of the remodeling, rebuilding and renovation work totalled $44,732.79, exeluding the cost of an elevator that was installed at a later date (Vol. II, 84). Found. P. C. R.

* * * * *

15. Two years after claimant moved in the building a new semi-automatic freight elevator with a penthouse for the controls on the roof was installed at a cost of $12,059.90 (Vol. I, 180; Vol. II, 84). Found P. C. R.

* * * * *

(P. 23)

63. After the change of grade of Oswego Boulevard (Ramp "C") there was no service road or any road left at grade in front of claimant's property (Exhibits 6, 8, 16). Found. P.C. R.

* * * * *

Claimant's Proposed Findings of Fact and Conclusions of Law.

(P. 24)

67. Claimant's property because of the change of grade of Oswego Boulevard, is substantially less accessible than it was before (Vol. I, 131-133; Vol. II, 68, 69, 103, 163, 189) (Compare Exhibits 5 and 6; 7 and 8; 9 and 10; 11 and 12; 13 and 14; 15 and 16). Found. P. C. R.

68. As the result of the change of grade of Oswego Boulevard, Claimant lost business and customers, causing claimant to look for another location to operate its business (Vol. II, 19-21.) Found. P. C. R.

69. By deed dated June 29, 1959 recorded in the Onondaga County Clerk's Office in Book of Deeds 1956, page 294, on the 29th day of June, 1959, claimant sold the premises described in deeds marked Exhibits 3 and 4 to a corporation known as Middle Oaks, Inc. (Exhibit 61; Vol. I, 189, 239, 240). Found. P. C. R.

70. This was an arm's length transaction in the ordinary course of business (Vol. I, 190, 191, 201, 202, 203). Refused except as found. P. C. R.

71. The consideration for the sale to Middle Oaks, Inc. was $41,000.00, part paid in cash and part by the assump-
(P. 25)
tion of an existing $25,000.00 mortgage (Vol. I, 254). Found. P.C. R.

* * * * *

77. Real Estate values in general increased substantially in the City of Syracuse between 1946 when claimant purchased the property, and 1957, when the change of
(P. 26)
grade of Oswego Boulevard was commenced (Vol. II, 215, 216). Found. P. C. R.

* * * * *

(P. 31)

CLAIMANT'S ADDITIONAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

* * * * *

(P. 33)

IX. A denial of the claimant's claim on the ground that under the authority of *Selig v. The State*, 10 N. Y. 2, 34 that there was no change of grade would be contrary to law and would deprive claimant of its property without due process of law and would take claimant's private property for public use without just compensation, in violation of Sections 6 and 7 of Article I of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the Constitution of the United States. Found. P. C. R.

X. Claimant's property has been taken in such a manner as to require the payment of just compensation under the provisions of Sections 6 and 7 of Article I of the Constitution of the State of New York and the Fifth and Fourteenth Amendments of the Constitution of the United States. Found. P. C. R.

(P. 57)

ORDER PERMITTING CLAIMANT TO INTRODUCE ADDITIONAL PROOF.

(SAME TITLE).

A motion having been made by the claimant for an order permitting claimant to introduce additional proof on the question of damages, and said motion having come on before the undersigned, Hon. Charles T. Major, Judge of the Court of Claims, at the State Office Building, Syracuse, New York, on the 20th day of July, 1961, said motion having been adjourned by consent from June 20th, 1961, and claimant having appeared by Costello, Cooney & Fearon, attorneys, by George R. Fearon, Esq., and the State of New York having appeared by Hon. Louis J. Lefkowitz, Attorney General, by Stanley V. Scott, Esq., Deputy Attorney General, and after hearing Mr. Fearon in favor of said motion and Mr. Scott in opposition thereto, and upon reading and filing the Notice of Motion and affidavit of George R. Fearon, Esq. sworn to the 7th day of June, 1961, and due deliberation having been had, it is

ORDERED that said motion be and the same is hereby granted and claimant is permitted to introduce additional proof on the question of damages upon a date to be hereafter fixed by the Court.

Dated, Syracuse, July 31, 1961.

CHARLES T. MAJOR,
Judge, Court of Claims

(P. 59

AFFIDAVIT IN SUPPORT OF MOTION SWORN TO JUNE 7, 1961.

(SAME TITLE).

State of New York
County of Onondaga } ss.:

GEORGE R. FEARON, being duly sworn deposes and says:

He is an attorney at law and a member of the firm of Costello, Cooney & Fearon, the attorneys for claimant.

Deponent was counsel for claimant on the trial of this action held in Syracuse, New York before Honorable Charles T. Major on October 6th, 7th, 10th and 11th; November 28th and 29th; and December 1st, 1960.

At the conclusion of the trial, Judge Major reserved decision in the case and gave counsel for claimant and the State the opportunity to submit proopsed findings of fact and conclusions of law; the minutes were typed and on or about May 16, 1961 the Attorney General served the Court and claimant with a copy of its proposed findings of fact; to date claimant's proposed findings have not been submitted to the Court and a decision has not as yet been rendered.

The within claim is for damages resulting from change of grade pursuant to section 99 of the Second Class Cities Law. At the time the case was tried the question of the ilability of the State for all damages arising out of the change of grade of Oswego Boulevard in the City of Syracuse had been established in the case of *National Biscuit Company v. State,* 24 M. 2d 106. Deponent predicated its

(P. 62)

him that they have made a re-appraisal and will be able to break down and clarify the basis of their previous testimony, if given the opportunity by the Court. It is sub-

Affidavit in Support of Motion sworn to June 7, 1961.

(P. 60)

method of proof upon the proposition that all consequential damages resulting from a change of grade in the City of Syracuse are compensable. (See Vol. 5, Nichols on Eminent Domain, pp. 25-28.) However, subsequent to the closing of proof in the case at bar on February 23, 1961, the decision of *National Biscuit Company v. State* was reversed in 12 A. D. 2d 998. In the decision of reversal, the Appellate Division ruled that the Court of Claims could not consider "loss of access or interference therewith or loss of view as compensable elements of damage".

Thereafter on May 19, 1961 the Court of Appeals rendered a significant decision in the case of *Selig v. State.* There the Court held that section 99 of the Second Class Cities Law imposed liability upon the State for change of grade. The Court there held that where the claimant was left with an adequate service road at grade there was not "change of grade" within the meaning of the Second Class Cities Law. The Court also held that there can be no recovery for interference with easements of light and air in a public street where the obstruction of such easements was not caused by the erection of an elevated railroad by or for a private corporation.

Neither the *National Biscuit* nor *Selig* cases are controlling in the case at bar. In both of said cases, the claimant was furnished with a service road at grade. The service road was 32 feet wide in the *National Biscuit* case and 27 feet wide in the *Selig* case. In the instant case, the former Oswego Boulevard was replaced by Ramp "C" which at some points along claimant's frontage is only 14 feet wide and is as much as eight feet below the level of the former Oswego Boulevard.

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While the rulings in *National Biscuit* and *Selig* do not deny the claimant compensation for damages which are "the direct result of a change in grade" they do raise questions about claimant's right to recover certain elements of damage considered by claimant's real estate experts in the case at bar.

On the trial herein, claimant's experts, Richard N. Groves and Robert J. Clark, testified that in their opinion the value of claimant's property before the change of grade was $196,000 and after was $48,600. They testified that they considered many aspects of damage in order to arrive at the total damage figure of $147,400 However, they did not attempt to allocate the amount of money attributable to each element.

Both witnesses indicated that the primary source of damage was that caused by the change of grade of Oswego Boulevard. This type of damage is clearly compensable under *Selig v. State,* supra. However, claimant's witnesses testified that they also considered such items as loss of advertising value, loss of view and interference with light and air. These elements of damage would not seem to be compensable under the *Selig* and *National Biscuit* decisions.

If the record in this case is permitted to stand without the addition of further testimony, the Court of Claims may have difficulty in determining what portion of the damages testified to by claimant's experts was allocated to items that are legally compensable and what portion was attributed to legally non-compensable factors. Deponent has talked to claimant's appraisers and they have advised

mitted that testimony of this kind will aid the Court of Claims and at the same time, will make a more complete record in the event the Court's decision is later reviewed on appeal.

WHEREFORE, deponent prays that the within motion be granted and the case be reopened to permit the introduction of further proof on the subject of damages.

GEORGE R. FEARON

(Sworn to June 7, 1961.)

(P. 71)

CASE.

* * * * *

(P. 141)

ROBERT F. BALDWIN, called as a witness in behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 142)

Q. In the meantime, what, if anything, was done with the property? A. The property was completely remodeled and rebuilt from one end to the other, sir, renovated.

Q. Let's start out and tell me—first describe the building, what was its exterior construction before you did anything, now? A. The original construction was similar to as it now exists with the exception of the first floor and the basement area. The approximately 103 feet facing Oswego Boulevard, at the time of purchase, it is my recollection that it had five separate entrances. This was remodeled, and in the course of remodeling it was necessary to reinforce at the basement level as well as the first floor into a single entrance.

(P. 143)

* * * * *

* * * A. At the time of the original purchase by Baldwin Hall Company of the building, it had been used in previous times as a storage warehouse * * *

* * * * * *

(P. 146)

Q. All right. Now, will you tell the Court the kind of things that you did sell? A. Our business is primarily electrical and industrial supplies, both retail and wholesale; and in addition to some appliances.

* * * * *

Q. Will you tell me what you sold there? A. I sold quite a variety of merchandise, everything electrical, lamp bulbs to various electrical fittings, in addition to such mill supplies as drills, abrasives, and also small appliances, electrical appliances such as flat irons, toasters, percolators.

* * * * *

Q. All right. Now, in this over the counter business, the retail business, did you tell me whether or not you

(P. 147)

supplied small contractors who came there to the office? A. That is right, sir.

Q. And generally, what would these electrical contractors be after when they did come during the day, as a rule? A. It has been the habit of the small electrical contractor to pick up himself all the necessary equipment for the installation on any job he is on, and he would usually come first thing in the morning, approximately 7:30 to 8 o'clock, and purchase such materials as were neecssary for installation that day. Oftentimes, he was back to the store three or four times a day, depending on the number of jobs or

whether he needed any additional equipment. There were other contractors also coming to our store, the larger contractors. They would send men there, electricians or foremen from the job, into our store to pick up emergency supplies, something that they had overlooked, or small items that were necessary for installation during the day.

* * * * *

(P. 152)

Q. Now, you have told me about your retail sales. How was your wholesale business conducted at this place? A. In the rear part of the first floor orders were filled or gotten ready for shipment. These orders were obtained by the company either by being sent in by our salesmen, phoned in by various customers, or mailed directly by our customers to us. And the various items that were called for were assembled, packed, and made ready for shipment

(P. 153)

and shipped from the rear of our building across our loading dock onto our own trucks or common carriers.

Q. All right. How many trucks did you have? A. Two.

Q. And where did you make deliveries to? A. We made deliveries in all directions from our store.

Q. Were you limited by the City of Syracuse? A. The City of Syracuse?

Q. Did you deliver to Mattydale, Liverpool, or adjacent areas? A. That is right, sir.

Q. And were some of your customers located in the northern part of the city and around Electronics Park, in Electronics Park, Industrial Park? A. That is correct, sir.

* * * * *

(P. 176)

Q. Have you recalled any further improvements that you actually made, Baldwin Hall actually made in this building at or about the time that you purchased it in '46 that you did not tell us about when I asked you on your direct examination? A. Yes, sir. I didn't go into the details of the actual improvements that were made to the building and should have added to my statement that acoustical ceilings were added to the first and second floor, walls were plastered.

* * * * *

(P. 177)

A. (Continuing) Acoustical tile was added to the first and second floor; walls were plastered where formerly they were exposed brick; under floors repaired, and, in addition, asphalt tile applied to them; necessary repair of windows; necessary trim for a finished operating office and store area.

Q. All right. Now, how many rooms did you put the acoustic tile in or what floor did you put it in on, whichever it is? A. The office area on the first floor, which is designated as our sales office.

Q. That is the space on the right-hand side as you went in? A. The right-hand side as you enter the main entrance; and on the second floor, the entire general office as well as conference rooms and the private offices.

Q. Now, on what floors did you do the plastering where the brick was exposed? A. Both the first and second floor in the same designated areas, the sales office and the general office.

* * * * *

Robert F. Baldwin for Claimant, Re-direct.
Milan J. Lyon for Claimant, Direct.

(P. 237)

Re-direct Examination by Mr. Fearon:

* * * * *

(P. 242)

Q. Did you list this property for sale with any real estate broker—and with whom—and when did you do it? A. Yes. In early April, 1959 we listed this building with Eagan, Pomeroy, Potter, Groves and Clark Real Estate.

Q. Are they representative, large brokers in the City of Syracuse? Real estate brokers? A. Yes, sir.

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(287)

MILAN J. LYON, called as a witness on behalf of the Claimant, being duly sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 296)

Q. Did you do any work on the second floor—any other work on the second floor? A. Yes. Some partitions to separate some of the office areas and toilet rooms; storage rooms; display room; conference room and I think four private offices.

The electrical wiring that was in there was very meager. It had to have an adequate wiring system put in.

Q. What portions of the building did you wire? A. We wired most extensively the basement, first, second and third floors. Some on the fourth and fifth but to a greater extent on the first three and the basement.

Q. What else did you do to the exterior of the building? A. We also had to repair the dock and extend it a little

farther west on the Belden Avenue side. We pointed up a number of the windows.

Q. How many openings were in the front of that building when you took it over—facing onto— A. I don't remember the exact number. I think it was six or eight separate openings on the front.

Q. What did you do about it? A. Closed them up. Let me change that—took them all out and replaced with plate glass windows across the front as shown by your photographs.

Q. Anything else you recall that you did to the exterior of the building? A. I think you'd call the roof "exterior". We replaced the complete roof and reflashed it.

Q. Yes, I would. That is what I was suggesting. What did these improvements cost Baldwin Hall? A. Well, the original extensive remodeling cost, which lasted the first year or so after we purchased it, cost $44,732.79.

(P. 297)

* * * * *

Q. Now, a year or two after that, did you make another improvement? A. Yes. We had to make one other, additional, major improvement which was a new elevator.

Q. What did you put in? A. We put in an Otis freight elevator from the basement to the fifth floor with a penthouse for the controls on the roof.

Q. What did that cost? A. $12,059.90.

* * * * *

(P. 298)

Mr. Fearon: I think we can agree—I offer to stipulate that the highest and best use for which the Baldwin Hall building was adapted on both the date the contract for the improvement of the arterial highway was awarded and the contract signed and

also on the date March 18, 1957, when work actually commenced, was for retail and wholesale purposes.

Is that agreeable?

Mr. Scott: I will enter into that stipulation that that is the highest and best use.

* * * * * *

(P. 299)

Q. Will you tell the Court what the front part of the building was used for. A. The front part of the building was used to transact the so-called "pick-up" business for customers including contractors, etc. where they would come in to pick up small orders, emergency materials that they wanted for use at that time and a good portion of it was in the category of retail business.

Q. At that time the customers could drive right up and step right out onto the sidewalk on Oswego Boulevard as shown in Exhibit # 28? A. Yes, they did.

Q. Did they? A. They did.

Q. Can you describe the character of that business? Who were you dealing with? A. Well, you are dealing with contractors; you are dealing with commercial organizations—well, let's say, electrical contractors, machine shops, job shops, manufacturers, institutions such as hospitals, schools, etc. where they want to pick up merchandise and get it quickly.

Q. What do you say as to the method of delivery in that business that came that way? Did they take it away with them or did you deliver it? A. Most of the trade that came in our front door into our so-called "store" for business came in, gave the order to the countermen and picked it up and took it with them.

Q. What was the Belden Avenue side of the building? A. The Belden Avenue side was where the loading dock

is and the use of that was principally for receiving and delivering and most of the business of a wholesale nature was transacted over in that area.

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(P. 337)

RICHARD N. GROVES, called as a witness on behalf of the Claimant, being duly sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 353)

Q. What in your opinion was the fair market value of the building prior to the 18th day of March, 1957 when (P. 354)

construction began? A. I would consider the depreciated value to be $149,370.00.

Q. Now, did you form an opinion as to the value of the land owned by Baldwin Hall on which this building was situated at this time? A. I did.

Q. What in your opinion was the fair market value of the land immediately prior to the 18th day of March, 1957? A. $46,680.00.

Q. Making a total for land and building prior to March 18, 1957— A. $196,050.00 which I rounded out to $196,000.00.

Mr. Scott: What was the last figure?

The Witness: $46,680.00.

By Mr. Fearon:

Q. Now, did you check that figure in any way? A. Yes, I did.

Q. How did you check it? A. I used the economic

method. I ascribed 5925 square feet per floor for the five floors which gave a total of 29,625 square feet at 75¢ or $22,220.00.

Q. Is that rental value? A. Estimated rental income —and I took 5% vacancy and loss or $1,111 making a gross effective rent of $21,109.00.

Mr. Scott: What was that figure?

The Witness: $21,109.00.

A. (Continuing) I took taxes $2713 for 1957; insurance $1086; repairs $994; management $527 and I depreciated the building at $2266 or a total expense item of $7586.

Mr. Scott: Let me have the building depreciation.

The Witness: $2266.

(P. 355)

Mr. Scott: What was the total?

The Witness: $7586.

A. (Continuing) Leaving a net to be capitalized of $13,523, which I capitalized at 6 2/3% return on investment, indicating a value of $203,048.

I capitalized the rate of return based on the band of investment theory of 5% for two-thirds portion and 10% for one-third.

By Mr. Fearon:

Q. Did you arrive at an opinion of the value of that building on or about the 22nd day of September, 1959? A. I did.

Q. When the job was finished? A. I did.

Q. Will you tell us the basis for your—

The Court: What was the date?

Mr. Fearon: 22nd of September, 1959. That is the date the barricades were removed and it was opened up.

A. I valued the property basically on the same reproduction figure of $271,590 and I observed depreciation and obsolescence of $230,850, giving a depreciated building value of $40,740. I valued the land after the improvement of $7850.00, leaving a fair and reasonable value to both land and building of $48,590.00.

Mr. Scott: The land value?

The Witness: $7850.

By Mr. Fearon:

A. Making a fair and reasonable value of land and building what figure? A. $48,600.00.

* * * * * *

(P. 388)

RE-DIRECT EXAMINATION by Mr. Fearon:

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(P. 390)

Q. Now, tell the Court whether or not in your opinion there was any increase in the value of real estate in Syracuse, particularly the area in which Baldwin Hall was located between 1947 when it was purchased—the property

(P. 391)

was purchased by Baldwin Hall and 1957 when the construction first commenced for the arterial project. A. You meant 1946, didn't you?

Q. 1946 and 1947. A. The differential between '46 and 1957 was very great. There was a very great increase in real estate values—not only in this area but every other area of Onondaga County.

Mr. Scott: I move to strike—

Mr. Fearon: What?

Mr. Scott: I move to strike the words "very great" increase.

The Court: "Very great" goes out.

By Mr. Fearon:

Q. Can you give the percentage? A. It is pretty hard to give a percentage. Some properties may have increased in value as much as 150% and some may not have increased over 50% to 75%. I think it would have to do with the individual parcel. I wouldn't want to give an over-all percentage. I don't think that is possible.

Q. Could you tell me what in your opinion the property increased from a purchase price of $46,000 to its value plus the additions or improvements of $56,000.00? A. I think I gave you that figure when I gave the figure of $200,000.00. I think it increased from 1946 to 1957 from $45,000.00 with the improvements I know have been made in the building to $200,000.00 in 1957.

* * * * *

(P. 398)

ROBERT J. CLARK, called as a witness on behalf of the Claimant, being duly sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 406)

Q. Did you form an opinion as to the fair market value based upon what a willing seller not under compulsion to sell would sell for and what a willing buyer not under compulsion to buy would pay for it after the construction was substantially completed? A. I did.

* * * * *

Q. Now, will you tell me what opinion of value you arrived at for the building after the construction using the formula that I have suggested—that is, the willing buyer and willing seller that I mentioned in my preceding question? A. In my summation method my after valuation was $48,600.00.

* * * * *

(P. 413)

I considered the building is isolated on a high retaining wall after construction; that it is more difficult for purchasers to reach the building after construction; that the building no longer is available and adaptable for commercial use; that the building after construction—the highest and best use is warehousing.

(P. 466)

CHARLES RILEY, called as a witness in behalf of the State, having been first duly sworn, testified as follows:

Direct Examination by Mr. Scott:

* * * * *

(P. 467)

Q. And you did arrive at a reproduction value, is that correct? A. I did

Q. Will you state the figure that you arrived at? A. The basic structure, reproduction cost would be $195,523.20. The improvements which were made within the last 10 years amounted to approximately $60,000.00.

Q. All right, Now, did you arrive at a total sound value of this property as of the year 1957? A. I did.

Q. What is that figure? A. Well, the best information I have is the building was built around 1900, which would make it a little better than 50 years old at the time in question. I allowed the building a 100 year life, or about a one per cent per year depreciation. I therefore took a 50 per cent depreciation from the $195,523.20, which left a sound value of $97,761.60 on the basic structure.

The Court: $97,700-what?

A. $97,761.60.

I used the same method on the $60,000.00 of improvements, which were only 10 years old. In other words, I took one percent a year, or 10 percent depreciation on the

George D. Clothier for the State, Cross.
Richard N. Groves recalled for Claimant, Direct.

(P. 468)

$60,000.00, which left a $54,000.00 sound value to the improvements. Or, by adding the two figures together, I get a total sound value of $151,761.60 or, in round figures, say $150,000.00.

* * * * *

(P. 514)

GEORGE D. CLOTHIER, a witness for the State, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Fearon:

* * * * *

(P. 520)

Q. * * * What was your before value for the land in 1957? A. $21,600.00.

* * * * *

(P. 559)

RICHARD N. GROVES, re-called as a witness on behalf of the Claimant, having been previously sworn, testified as follows:

Direct Examination by Mr. Fearon:

* * * * *

(P. 561)

Q. When did you make the re-appraisal? A. I would say we started conferences shortly after the decision was made and we have had several conferences and worked out the re-appraisal during that period of time. It is probably almost a year.

Q. You said "since the decision". You mean the decision in the Selig case? A. Yes.

Q. Now, what is your opinion of the fair market value of the building prior to the construction? A. $149,370.00.

Richard N. Groves recalled for Claimant, Direct.

Q. And the value of the land prior to the construction and the appropriation? A. $46,680.00.

Q. Have you changed your opinion as to the fair market value of the property before and after the reconstruction of the new Oswego Boulevard? A. No, I have not.

Q. Will you assume, that as a result of the legal effect of the decisions which I have mentioned, you are obliged to eliminate from your consideration, in arriving at the figure that represents the loss or reduction of the fair market value of the property, the following factors: diversion of the flow of traffic, circuity of access, loss of view from Salina Street or Oswego Boulevard, difficulty in driving tractor trailers to and from the property, the narrowing of West Belden Avenue, the construction of the new bridge over Oswego Boulevard and North Salina Street; interference with light and air; the fact that (P. 562)

Belden Avenue no longer crosses North Salina Street; loss of direct access to Salina Street by reason of the wall on the westerly side of North Salina Street and loss of the team track on the north side of West Belden Avenue —assuming that you can consider as legal damages only those directly resulting from the change in grade of Oswego Boulevard and assuming that you are obliged to exclude the items which I have just read and any other items which are not the direct result of the change of grade of Oswego Boulevard, are you able to state whether your after figure—that is, after the appropriation figure —would be changed? A. Yes, it would.

* * * * *

(P. 613)

JUDGMENT OF REVERSAL.

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(P. 614)

"* * *

This Court hereby makes the following new conclusions of law:

1. The diminution in value of claimant's property is considered as *damnum absque injuria.*

(P. 615)

2. The judgment, insofar as it awards damages, should be reversed and the claim dismissed; and

It is hereby further ORDERED, That the judgment so appealed from, insofar as it awards damages to claimant be, and the same hereby is unanimously reversed on the law and the facts, and the claim is hereby dismissed, and otherwise the judgment is hereby affirmed, without costs of these appeals to either party.

Memorandum, which is hereby make a part hereof."

* * * * *

ORDERED AND ADJUDGED that the judgment of the Court of Claims entered in the Clerk's Office thereof on July 12, 1963, insofar as it awards damages to claimant be, and the same hereby is unanimously reversed on the law and facts, and the claim is hereby dismissed, and otherwise the judgment is hereby affirmed, without costs of these appeals to either party, memorandum, which is hereby made a part hereof.